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Designed to be used with above-average junior high students or to serve as a take-off point for high school students, this unit raises the question of what the role of the Supreme Court is in American government. The unit begins with evidence of the Court's deciding different ways at different times in similar cases, and proceeds to an investigation of the Court Packing fight of the 1930's, in which the Court emerges as a distinctly political institution. In subsequent sections, the student investigates the origins of the Court, the principle of judicial review, and the views of those who believe that the Court acts "unconstitutionally" and/or "undemocratically." Final sections raise the question of how American liberties are protected in a majoritarian "government of laws." (Author)

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# THE SUPREME COURT AND THE DYNAMICS OF AMERICAN GOVERNMENT

Teacher and Student Manuals

(Public Domain Edition)

Stephen R. Holman

Committee on the Study of History
Amherst, Massachusetts

TE 499 956

EXPERIMENTAL MATERIAL
SUBJECT TO REVISION
PUBLIC DOMAIN EDITION

TEACHER'S MANUAL

# THE SUPREME COURT AND THE DYNAMICS OF AMERICAN GOVERNMENT

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This material has been produced
by the
Committee on the Study of History, Amherst, Massachusetts
under contract with the U. S. Office of Education
as Cooperative Research Project #H-168.

# INTRODUCTION

This unit invites students to examine the Supreme Court in action in order to illuminate the dynamic nature of American government. The cutting edge of inquiry is the problem of maintaining liberty in a system based upon democracy and the concept of the rule of law.

The hypothesis that informs the content and structure of the unit is that government is dynamic rather than static. Seen this way, its study offers real potential for raising numbers of important questions. Not the least of these is the principal question of this unit: How does the American government sustain liberty? In the pursuit of that genuinely open-ended question, the answer to which is contained in part in the discovery that the government is dynamic, students will cope with others. What is the Supreme Court? What are the implications of the fact that the court reverses itself? Is the Court political, and if so what does this mean? What is judicial review, and what are its implications for democracy? What dangers are there in unreviewable legislatures? To what degree should courts practice judicial restraint?

The organization of the unit is simple. The evidence in Sections I through III raises questions as to the nature and role of the Court. Sections IV and V deal with judicial review, its origins, and implications for democracy. Section VI invites students to discover what can happen in a country, the Republic of South Africa, where courts can't or won't review laws made by a legislative majority. The last section presents evidence from the contemporary controversy over how much restraint the Court should show in reviewing law.

## SECTION I

## THE JUDICIARY REVIEWED

This section offers eight statements about the Court. The intent is to emphasize the wide diversity of thinking about the Supreme Tribunal and its role. The remarks should emphasize to the students the lack of clear agreement as to the role of the Court and invite them to ask, What does this add up to? The identification of each commentator has been kept to a minimum in order to help keep the focus on the Court itself.

One might choose to introduce the unit by distributing the materials, allowing a brief opportunity for the students to read the statements, and then asking individual students to explain what one of the seven writers is saying about the Court. The question Is there any agreement among these people? should lead to the larger question: What, then, is the Supreme Court? It might be desirable to have the students write brief answers to the question, with the papers to be held until the end of the unit.

## SECTION II

## JUDICIAL REVERSAL

The documents in this section permit students to discover that the Court engages in something beyond simple interpretation of the law. It reverses itself, sometimes very rapidly, at other times rather slowly, for a bewildering number of reasons. But the key to the section is the fact of the reversals, the evidence that the Court, whatever else it may be, is not consistent.

It is assumed that the students will bring to this unit the generally held picture of an Olympian body of old, dignified, rigid men handing down final pronouncements based on clear-cut precepts of immutable law. These examples are chosen to attack that stereotype. The students should wonder just what the basis is for deciding law and why the Court can see fit to reverse itself.

This Section presents three pairs of decisions, each demonstrating reversals of the Court's position, varying as to motive, time and reasoning. When assigning the reading it might be desirable to ask the students to examine each example for similarities and dissimilarities. The class could be opened by discussion each case briefly. It might be useful to keep an eye out for vocabulary difficulties and for problems in understanding the mechanics of handing down decisions. The explanations have been kept minimal, but you may deem it useful to take time to expand on the workings of the Court.

Questions that should serve to shed light on judicial reversal might be: What do these cases have in common? What kind of arguments are used in these cases? What period of time elapsed between the two cases? What do these cases demonstrate? and finally, What are the implications of judicial reversal?

## SECTION III

## THE JUDICIARY REVERSED

This section invites students to see the Court caught up in a political situation. The evidence suggests that the Court itself responds politically. Thus, by the time students have worried through the first three Sections, they might well be in the position of saying, "I'm not sure what the Court is but I know it is at times inconsistent and at times political."

The section has been divided into two parts. Part A concerns itself with background and Part B with the court battle itself. The students may have studied the New Deal period, and you may wish to eliminate or condense Part A and move directly to the controversy itself.

The documents in Part A serve, for the most part, as narrative background to the episode. The main concern here is the identification of the problem, the Court's frustration of the Roosevelt program, and the implications that the court seemed to be denying the overwhelming mandate given Roosevelt by American voters. In the evidence from Flynn's The Roosevelt Myth and from President Roosevelt himself might support an interesting exercise in document analysis.

In a discussion of the evidence in this section, questions along these lines might be useful: Was the Supreme Court the villain in upholding the Constitution? What is the Constitution? What basic problem underlies this episode? How did Roosevelt interpret the election results? Why did Roosevelt want to appoint six more justices? How would you evaluate Roosevelt's solution to the political bind in which he found himself? Finally, what view of the whole situation is implicit in the humor of the final excerpt from I'd Rather be Right?

Part B contains evidence of the court switching its position and thus sustaining the sort of legislation that the New Dealers favored. What was the Court doing when it made this switch? What was meant by the popular saying of the day, "A switch in time saves nine?" What would have happened had the Court not switched and Roosevelt had had his way? Who came out the winner in this episode? What was won? What does this episode reveal about the nature of politics?

## SECTION IV

## JUDICIAL REVIEW

The evidence in this section bears upon judicial review, a form unique to our judiciary and to our government. Judicial review plays a role in the controversies raised in Section I. It also is present in the issues raised about the Court in Sections II and III. In the final section (VII) of the unit, students will have to deal with it in hammering out their own answers to the main question posed by the unit. Thus it is vital that the students understand what judicial review is and what are its implications.

The first two documents in Part A, the "Brutus" letter and a selection from Alexis de Tocqueville, spell out the concept. They also point to the fact that English courts do not have this power. The third document presents the relevant sections of the Constitution.

In assigning these selections, it might be desirable to ask the students to isolate what idea seems to be unique to our government's judiciary and to attempt to locate where it is spelled out in the Constitution. The class could be opened by asking the students to articulate the concept of judicial review. Once this has been accomplished, you will probably wish to "attach" the term itself to the concept. The students will have discovered that judicial review isn't spelled out in the Constitution. From this will follow the question of Where judicial review originated? Students might be asked to locate where it was spelled out during the Constitutional convention or during the debates about ratification of the Constitution.

This leads directly to consideration of Part B which offers some evidence of the thinking expressed during the period and concludes with the first specific claim of this power in Marbury v. Madison (B-5). In discussing Gerry's comments (B-1), you may need to help the students keep in mind the fact that he was speaking against the proposed council of revision in Randolph's "Virginia Plan." Corwin, in his Court Over Constitution, suggests that Hamilton wrote Federalist articles Numbers seventy-eight and eighty-one (B-3 and 4) in response to the "Brutus" letters (A-1).[1] You may wish to explore this idea with your students. It is in Marbury v. Madison of course, that the doctrine of the Supreme Court's power to overrule a law passed by Congress is first spelled out by the Supreme Court. After examining the decision, some questions that might arise are: Was Marshall basing his decision on clearly written precedents? Do you feel he was on as firm ground as he seems to assume?

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[1]Edward S. Corwin, Court Over Constitution, A Study of Judicial Review as an Instrument of Popular Government (Peter Smith, Gloucester, 1957), 9, fn. 5

Was he over-reaching his powers?[2] Was he merely applying on the Federal level what state courts had been doing to state laws for some time? (B-3)

Further questions might be raised along these lines. Why, if Great Britain doesn't have judicial review, do we? Is the British system more democratic than ours? What might the fact that judicial review wasn't spelled out in the Constitution mean? If the Court can be inconsistent and political what danger do you see in its having the power of judicial review?

---

[2]It might be of interest to the students to note that the Supreme Court did not over-rule an act of Congress for another fifty-four years. The first such decision was the Dred Scott decision in 1857.

## SECTION V

## THE RULE OF LAW OR MEN?

This section is designed to raise the issue of the potential threat posed to democracy by the Court and to allow students to discover the growth of the power and scope of the Supreme Court, particularly under the leadership of John Marshall. Public reaction to the Court and to its exercise of power plays a major role in this section. The section also serves to help clarify some of the ramifications of the increased role the court plays in our government and the reasons why this growth is resisted. The basic questions raised are: Is the Court a potential threat to democracy? How has it gained such power, and is it more apparent than real?

Part A serves as an introduction. Its purpose is to raise the question, What has happened in the time that has elapsed between these two documents?

Part B presents a few of the many decisions of Marshall's Court that were to lay the foundations of the Supreme Court's power. Each decision and the evidence of the reaction to each decision point to some of the sources of contemporary criticism. Including Marbury v. Madison (IV, B-5), the students have four decisions to examine. Each of these could be approached with similar questions: What power or powers is the Court claiming for itself? For the federal government? On what basis are the critics resisting? What are the implications?

Part C provides modern criticisms of the Supreme Court and poses with great emphasis the theory that the Court may well have assumed powers never intended by the writers of the Constitution. It would appear that this section, like the preceding one, could best be handled by asking the same or similar questions of the three documents: On what grounds are these critics objecting to the action of the Supreme Court? Are the objections valid?

Toward the end of any discussion of the evidence in this section students might be asked if they think we should abandon judicial review and adopt the more democratic British system under which the representatives of the people decide what the law is, and the role of the courts is limited?

## SECTION VI

## SOUTH AFRICA - ANOTHER SYSTEM

This section is to provide evidence from a brief glimpse at a country whose judiciary can not or will not review laws made by a legislature or executive decisions. Does this effect the student's opinion of judicial review? Can legislatures be trusted to protect the civil rights of citizens?

If students suggest that South Africa is not "democratic" because of voting restrictions, the teacher may point out the large number of Americans disenfranchised for a number of reasons. Does the percentage of voters indicate how "democratic" a country is? The figure is very high for Soviet Russia. The teacher might also wish to point to the large number of California voters who voted against fair housing laws in a referendum. Can we place our trust in majorities to protect civil liberties? The teacher might also point to the state legislatures that passed laws forcing flag salutes and "separate but equal" facilities.

The first two articles evidence differing views of the South African judiciary: an address by the former Chief Justice of the Union of South Africa Supreme Court (#1), and an article on the loss of civil rights by South Africans (#2). The concluding article is an account of one person's experiences with South African justice (#3). The articles were chosen to place emphasis on experiences of Caucasians, for a discussion of apartheid would tend to distract students from the primary purpose, which is the consideration of the judicial process. How does the judicial system of the Republic of South Africa differ from that of the United States? The discussion might than proceed to the relationship between the Chief Justice's remarks and the rest of the evidence. How can the difference be explained? A subsidiary problem that might be touched upon would be the question: Why doesn't Britain, with similar government, have the same sort of police behavior? Here the notions of traditions and commitment to ideals might be stressed.

In this connection the idea of a homogeneous population as opposed to a heterogeneous one might be touched upon. That is to say, to what degree does this effect one's willingness to allow his neighbor liberty? The discussion may lead to the question Could what is happening in South Africa happen in the United States? Do our Courts provide important protection for civil rights? Or does the basic guarantee of civil rights rest with the people of a country?

## SECTION VII

## JUDICIAL RESTRAINT

The evidence in the concluding section stems from the major contemporary source of contention about the Supreme Court. This is the dispute between advocates of judicial restraint and advocates of the position that the Court should assert its power of review, particularly in the area of civil rights. The former see legislatures being with the courts "the ultimate guardians of the peoples' liberty and welfare." In short, they believe the Court should not play God. Thus, in the context of the 1930's, judges of this turn of mind were liberals. Today, however, in the context of the civil rights controversy, they are conservatives.

Evidence of this sort further points up the nature of the Court. Its binds and the pressure for change and adjustment come from having to cope with successive redefinitions of the problems with which it is confronted. For example, to many, liberty in the 1930's was associated with legislative action. Today many see it in an increasingly more absolute interpretation of the Bill of Rights.

The first article, drawn from the Reader's Digest (#1) presents an impassioned plea for the Court to reconsider much of its recent trend to libertarianism. The remaining selections spell out the controversy. The book review by Edmond Cahn presents both sides and the statements by Justice Black (#3) and by Justice Frankfurter (#4) serve to clarify the two positions. The argument of the entire unit is most succinctly spelled out in Justice Frankfurter's dissent.

Discussion of this section might begin by asking the students to square the impression given by the Reader's Digest article with that gained during their brief examination of judicial powers in South Africa. The remaining items, spelling out the liberty-restraint dispute, could be presented by asking "Which position comes closest to that presented in the Reader's Digest?" The class might be asked to take part in a debate in which the students assume the positions presented.

By way of conclusion, the student may want to consider the fundamental question arising from Justice Frankfurter's dissent: Who is the ultimate guardian of our liberties and welfare? Is it the Court, as Justices Black and Douglas seem to say? Or is it the legislature and the voters as Justice Frankfurter said? Or is it some sort of dynamic relationship among all three? You may choose to raise this question rather briefly in class and then assign the question as a final paper.

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## NOTE TO THE PUBLIC DOMAIN EDITION

This unit was prepared by the Committee on the Study of History, Amherst College, under contract with the United States Office of Education. It is one of a number of units prepared by the Amherst Project, and was designed to be used either in series with other units from the Project or independently, in conjunction with other materials. While the units were geared initially for college-preparatory students at the high school level, experiments with them by the Amherst Project suggest the adaptability of many of them, either wholly or in part, for a considerable range of age and ability levels, as well as in a number of different kinds of courses.

The units have been used experimentally in selected schools throughout the country, in a wide range of teaching/learning situations. The results of those experiments will be incorporated in the Final Report of the Project on Cooperative Research grant H-168, which will be distributed through ERIC.

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This unit was initially prepared in the summer of 1967

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# INTRODUCTION

The unit that follows is a study of the Supreme Court in American government, and how it works, what it does, and why. It takes a quite different approach to the study of the Court, and the government, from the one that traditionally finds its way into civics books. Instead of approaching it formally, as an institution, it approaches it "functionally," as people doing things. As you investigate what they do and why, you will want to ask yourself if this is as it should be, and what it means for all of us as citizens.

## SECTION I

## THE JUDICIARY REVIEWED

The documents in this section range in time from the earliest days of the American republic to the present. They have one thing in common. All are commentaries on the judicial branch.

1. In 1789 President Washington wrote a letter to each of the associate justices whom he appointed to serve on the first Supreme Court.[1]

New York, September 30, 1789.

> Sir: I experience peculiar pleasure in giving you notice of your appointment to the Office of an Associate Judge in the Supreme Court of the United States.
>
> Considering the Judicial System as the chief Pillar upon which our national Government must rest, I have thought it my duty to nominate, for the high Offices in that department, such men as I conceived would give dignity and lustre to our National Character. . . .

2. Thomas Jefferson, writing to Thomas Ritchie of Virginia in 1820:[2]

> The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric.

3. Published in 1848, Chancellor Kent's Commentaries remained for generations a basic text for young lawyers.[3]

> In monarchical governments, the independence of the judiciary is essential to guard the rights of the subject

---

[1]George Washington, The Writings of George Washington from the Original Manuscript Sources 1745-1799 (John C. Fitzpartick, ed., Government Printing Office, Washington, 1939), XXX, 424-425.

[2]Thomas Jefferson, The Writings of Thomas Jefferson (Andrew A. Lipscomb, ed., The Thomas Jefferson Memorial Association, Washington, 1903), XV, 297.

[3]James Kent, Commentaries on American Law (William Kent, New York, 1848), I, 293-294. (Footnote omitted.)

> from the injustice of the crown; but in republics it is equally salutary, in protecting the constitution and laws from the encroachments and the tyranny of faction. . . . Nor is an independent judiciary less useful as a check upon the legislative power, which is sometimes disposed, from the force of party, or the temptations of interest, to make a sacrifice of constitutional rights; and it is a wise and necessary principle of our government . . . that legislative acts are subject to the severe scrutiny and impartial interpretation of the courts of justice, who are bound to regard the constitution as the paramount law, and the highest evidence of the will of the people.

4. In an article appearing in the American Bar Association Journal Anthony Lewis, a Pulitzer prize-winning journalist, said:[4]

> [The author suggests that the sense of fairness associated with the Supreme Court affects government action perhaps more strongly than its official decisions.]

5. Senator Goldwater expressed his views in a book prepared as part of his successful campaign to capture the Republican nomination for the Presidency in 1964.[5]

> [Senator Goldwater states that while he respects the Supreme Court, he believes that the Constitution is the "supreme law of the land," and he cautions against allowing the Supreme Court to intrude upon the legislative sphere of government.]

6. In a recent article reviewing the 1967 term and assessing the behavior of the Supreme Court in the future, James Kilpatrick stated:[6]

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[4]Anthony Lewis, "A Newspaperman's View: The Role of the Supreme Court," American Bar Association Journal, VL (September 1959), 911-913.

[5]Barry Goldwater, The Conscience of a Conservative (Victor Publishing Co., Shepherdville, 1960), 36.

[6]James Jackson Kilpatrick, "Term's End," National Review, XIX, No. 29 (July 25, 1967), 804. (150 East 35th Street, New York, N.Y. 10016)

> [The author claims that the law, far from being a statement of abstract truth, is rather the handiwork of men; in reality the Supreme Court plays an active role in shaping law.]

7. The Federalist Papers were a series of newspaper articles written largely by Alexander Hamilton, aided by James Madison and John Jay. Intended to persuade people to ratify the proposed Constitution, they explained its underlying ideas and emphasized the necessity for a new government and the benefits to be gained by adopting the new plan. We study the Federalist Papers today for the light which they shed on the thinking of these men who were among the most influential in writing and expounding the Constitution. Number seventy-eight, written by Alexander Hamilton, states:[7]

> [W]henever a particular statute contravenes the Constitution, it will be the duty of the Judicial tribunals to adhere to the latter, and disregard the former. . . .
>
> The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the Legislative body.

8. The following passage is drawn from a book which comes highly recommended by Robert Welch, the founder of the John Birch Society, and which is distributed by book stores operated by the Society:[8]

> [The author considers the work of the Court to be the interpretation of the Constitution in order to maintain the kind of government originally prescribed therein.]

---

[7] E. H. Scott, ed., The Federalist and Other Constitutional Papers by Hamilton, Jay, Madison, and Other Statesmen of Their Time (Albert, Scott, & Co., Chicago, 1894), I, 428.

[8] Rosalie M. Gordon, Nine Men Against America, The Supreme Court and Its Attack on American Liberties (The Americanist Library, Western Islands, Belmont, Mass. 1965), 8-9.

## SECTION II

## JUDICIAL REVERSAL

Except for a few instances of original jurisdiction, the Supreme Court is an appellate court. It hears appeals from lower court decisions, both federal and state.

After hearing both sides of a case, the justices vote in private to determine how the Court will find in the case. A justice who voted with the majority is appointed to write the Court's decision. This is read at a later date and becomes the law of the land. Other justices in the majority, if they desire, may write separate concurring opinions in which they enlarge upon or disagree with details in the majority decision. Justices in the minority may and often do write dissents in which they explain their reasons for disagreeing with the majority opinion.

1. Until very recently in history "money" meant specie, coins usually gold or silver. Then governments and banks began issuing paper money or notes. These usually promised to pay the bearer specie upon demand. That is to say, a person could take his paper money to the bank or government that issued it and demand the equivalent amount in coin. Because at various times banks and governments issued more notes than they could back with specie at any given moment, people tended to distrust it.

During the Civil War the Union issued huge sums of paper money to pay for the expenses involved. The Congress passed a law stating that this paper money was legal tender. This meant that a person had to accept the paper money in payment of a debt even though he knew that the government did not have enought specie to back it. Its value tended

to fluctuate with the fortunes of the Union. Sometimes a person could get a silver dollar for a paper "legal tender" dollar. Sometimes he could not.

Salmon Chase, Lincoln's Secretary of Treasury, had deep misgivings about this procedure. He felt the law authorizing the issuance of the notes was unconstitutional. Near the end of the war, he was appointed Chief Justice of the Supreme Court and was thus serving on the Court when the question of the constitutionality of the Legal Tender Act was brought to the Court in the case of Hepburn v. Griswold. Excerpts from the majority decision follow:[1]

> The CHIEF JUSTICE delivered the opinion of the court.
>
> The question presented for our determination by the record in this case is, whether or not the payee or assignee of a note, made before the 25th of February, 1862, is obliged by law to accept in payment United States notes. . . .
>
> We are thus brought to the question, whether Congress has power to make notes issued under its authority a legal tender in payment of debts, which, when contracted, were payable by law in gold and silver coin.
>
> The delicacy and importance of this question has not been overstated in the argument. This court always approaches the consideration of questions of this nature reluctantly; and its constant rule of decision has been, and is, that acts of Congress must be regarded as constitutional, unless clearly shown to be otherwise. . . .
>
> We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an act is inconsistent with the spirit of the Constitution; and that is prohibited by the Constitution. [Act declared unconstitutional.]

---

[1]Wallace 603 (1870), 606, 610, 625. (Footnotes omitted.)

2. Many people including President Grant, thought that the decision in Hepburn v. Griswold threatened the financial stability of the nation. Within a year, a new set of cases, called the Legal Tender Cases, came before the Court. The majority now held the Legal Tender Act constitutional. An excerpt from one of the opinions follows:[2]

> Where the decision is recent, and is only made by a bare majority of the court, and during a time of public excitement on the subject, when the question has largely entered into the political discussions of the day, I consider it out right and duty to subject it to a further examination, if a majority of the court are dissatisfied with the former decision. And in this case, with all deference and respect for the former judgment of the court, I am so fully convinced that it was erroneous, and prejudicial to the rights, interest, and safety of the general government, that I, for one, have no hesitation in reviewing and overruling it.

3. In the late 1930's, as World War II approached, the Board of Education in Minersville, Pennsylvania, ruled that all students and teachers must salute the flag, expulsion being the penalty for non-compliance. A religious group, Jehovah's Witnesses, objected, and took the question to court. The Supreme Court considered the issue in the case of Minersville School District v. Gobitis:[3]

> Mr. Justice Frankfurter delivered the opinion of the Court.
>
> A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. . . .
>
> Lillian Gobitis, aged twelve, and her brother William, aged ten, were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise. The local Board of Education required both teachers and pupils to participate

---

[2] 12 Wallace 457 (1871), 570-572.

[3] 310 U. S. 586 (1940), 591, 594, 598. (Footnote omitted.)

in this ceremony. . . .

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. . . .
>
> The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. . . . [The] courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideal of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it. [Minersville School Board upheld.]

4. Subsequent to the Minersville decision, a number of states and local school districts passed laws making the flag salute compulsory. Many people thought that the laws in effect persecuted Jehovah's Witnesses. Four years later a new case, West Virginia State Board of Education v. Barnette, was brought to the Court:[4]

> Mr. Justice Jackson delivered the opinion of the Court. . . .
>
> The [West Virginia State] Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's Gobitis opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."
>
> Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" and may be proceeded against as a delinquent. His parents

---

[4]319 U. S. 624 (1943), 625-626, 629-630, 641-642. (Footnotes omitted.)

or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction [legal order] to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency. . . .

This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do. . . .

Those who being coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. . . .

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we

deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. . . .

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in Minersville School District v. Gobitis and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is

Affirmed.

5. The case of Plessy v. Ferguson[5] was decided by a nearly unanimous court, with only Justice Harlan dissenting.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. . . .

The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. . . .

[2. As to the Fourteenth Amendment] the object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions

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[5]163 U. S. 537 (1896), 540, 542, 544, 548, 550-552. (Citations omitted.)

based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their eseparation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. . . .

[We] think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges of immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment. . . .

[We] cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

6. For fifty-eight years segregated schools were justified by reference to Plessy v. Ferguson. The issue was raised again by a number of cases

which came to the Supreme Court in the early 1950's. The Court's landmark decision in Brown v. Board of Education of Topeka, handed down in 1954, decided the issue on these cases:[6]

> Mr. Chief Justice Warren delivered the opinion of the Court. . . .
>
> In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of these cases . . . a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this court in Plessy v. Ferguson. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. . . .
>
> The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. . . .
>
> In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. . . .
>
> Here, . . . there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white

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[6]347 U. S. 483 (1954), 486-488, 490-495. (Footnotes and citations omitted.)

schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education to our democratic society. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school" In McLaurin v. Oklahoma State Regents, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

## SECTION III

## THE JUDICIARY REVERSED

The documents in this section deal with one of the most dramatic episodes in the history of the Supreme Court. It came at a time of crisis and heightened tensions throughout the land.

### A. The Great Depression and The New Deal

Historians point to the Great Depression of the 1930's as being one of the two most traumatic events in our history, the other being the Civil War.

President Franklin D. Roosevelt's program to cope with the economic dislocations of the time was called the New Deal.

1. In his book "The Roosevelt Myth," John T. Flynn, a newspaper columnist of the period, gave a vivid description of the "First Hundred Days" of the Roosevelt administration:[1]

> [The passage describes the despair in the land at the time of Roosevelt's inauguration, March 4, 1933. Excerpts from Roosevelt's speech are quoted, including the phrase "the only thing we have to fear is fear itself." Roosevelt here blamed financial powers for the crisis and exhorted the people to return to"old moral values." The subsequent acts of a "dizzy" ongress are enumerated: the closing of banks, and the establishment of the Agricultural Adjustment Act, Works Progress Administration, National Recovery Act, etc. The author considered the nation well on the way to recovery by June 1 of the same year.]

2. The next two years brought some economic improvement, but people began to take another look at the New Deal. As Flynn went on to describe, it was the NRA which received the heaviest criticism:[2]

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[1] John T. Flynn, The Roosevelt Myth (Devin Adair Co., 1948), 3-13. (Footnote omitted.)

[2] Ibid., 46-47, (Footnote omitted.)

[The passage outlines the investigation of the NRA under Clarence Darrow, the subsequent damnation of the Act by this committee as "oppressive, monopolistic," etc., Roosevelt's easing out of the NRA head Hugh Johnson, and finally the unanimous Supreme Court decision that the NRA was after all unconstitutional on the grounds that only Congress should have the power to make laws.]

3. This was the lead article on the front page of the Boston Transcript on May 31, 1935:[3]

Executive Clearly Worried
Over Court's Definition of
Interstate Commerce

[The article describes a press conference in which Roosevelt deals with the decision of the Supreme Court concerning the NRA. The president said that the legality of other boards, the Security Exchange Commission, for example, was challenged by this decision. He warned that the undermining of Federal authority in economic affairs would revert the country to "horse and buggy days," and that the people would have to decide, perhaps by ballot, whether they wanted strong Federal powers in social and economic matters.]

4. The following statistics show the results of the presidential elections of 1932 and 1936:[4]

| 1932 | Popular Vote | Electoral Vote |
|---|---|---|
| Roosevelt | 22,821,857 | 472 |
| Hoover | 15,761,841 | 59 |
| **1936** | | |
| Roosevelt | 27,751,597 | 523 |
| Landon | 16,679,583 | 8 |

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[3]Boston Transcript, May 31, 1935, 1.

[4]Adapted from Historical Statistics of the United States; Colonial Times to 1957 (Government Printing Office, Washington, 1960), 688.

5. The following chart suggests the extent of President Roosevelt's political support in Congress.[5]

Political Party Affiliations in Congress 1933-1941

| | House | | Senate | |
|---|---|---|---|---|
| Year | Democratic | Republican | Democratic | Republican |
| 1933-1934 | 310 | 117 | 60 | 35 |
| 1935-1936 | 319 | 103 | 69 | 25 |
| 1937-1938 | 331 | 89 | 76 | 16 |
| 1939-1941 | 261 | 164 | 69 | 23 |

6. In 1941 Franklin D. Roosevelt reviewed the events of this era in the introduction to the 1937 volume of his official papers:[6]

> [Roosevelt claims that the election results of 1932, and again in 1934, affirmed that the people wanted the Federal government to have active control of economic forces. But blocking executive and legislative moves toward this end was the Supreme Court. Roosevelt mentions relevant decisions: in 1935 the Frazier-Lemke act, designed to help farm mortgagers, was declared unconstitutional; Roosevelt was denied the power to remove a Federal Trade Commissioner, the NRA was declared unconstitutional; the Agricultural Adjustment Program was invalidated; the court nullified a New York statute which provided a minimum wage system for women in industry. Roosevelt claims that the indications were that the Supreme Court would block further Federal attempts to regulate national economic life. He saw his strong electoral majority in 1936 as reinforced popular belief in Federal action. To this end Roosevelt attempted to change the character of the Court and thus affect its decisions.]

7. On February 5, 1937, President Roosevelt sent a message to Congress which took both the legislators and the public by surprise. The Boston

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[5] Adapted from Ibid., 691.

[6] Franklin D. Roosevelt, The Public Papers and Addresses of Franklin D. Roosevelt, 1937, The Constitution Prevails, (The Macmillan Co., New York, 1941), L, LIII-LXIII. (Footnotes omitted.) (Used by permission of Hon. Samuel Rosenman.)

Transcript reported the event under banner headlines:[7]

ROOSEVELT MOVES TO DOMINATE COURT
Six More Justices Asked in Message

[The article describes Roosevelt's request to Congress that he be authorized to appoint additional judges to all Federal Courts, including the Supreme Court. Roosevelt pointed to better cooperation between legislative and judicial branches of government resulting from this move. The writer points out that the acceptance of the president's proposal would enable Roosevelt to influence Court decisions. The writer foresees objection from both parties to this plan.]

8. From I'd Rather Be Right, a hit musical of 1937:[8]

[In an exchange with Morgenthau, Secretary of the Treasury, Roosevelt makes light of the powers of his Congress and Supreme Court. He is piqued finally by the unexpected, if ineffectual, appearance of the Court at the end of the scene.]

## B. The Court Reorganization Battle

The evidence in this part illuminates how the issue was resolved.

1. The editorial page of the Boston Transcript expressed the views held by a majority of newspapers throughout the country:[9]

A Shameless Bid for Power

[The article brands Roosevelt's bid for the power to appoint additional judges to the Supreme Court as a "brazen request," "revolutionary," and "menacing." The author urges non-partisan oppositon to themove.]

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[7] Boston Transcript, February 5, 1937, 1.

[8] George S. Kaufman and Moss Hart, I'd Rather Be Right (Random House, New York, 1937), 34-36.

[9] Boston Transcript, February 6, 1937, 2.

2. Writing in The Nation, a magazine presenting liberal opinions, Paul Ward entitled his article "Roosevelt Will Win":[10]

ROOSEVELT WILL WIN

[The article predicts victory for Roosevelt's proposal on the grounds that the general populace is in favor of the measure and the legislators, as politicians, will heed this voice.]

3. On April 17, 1937, Scholastic Magazine reviewed the decisions handed down the previous week by the Supreme Court:[11]

SUPREME COURT TAKES LIBERAL TURN

[In the spotlight due to Roosevelt's proposal, the Supreme Court reversed some earlier stands: it supported a minimum wage law in Washington, upheld the Railway Labor Act, and declared constitutional the Frazier-Lemke Farm Mortgage Moratorium. The writer sees the effect of the decisions on Roosevelt's plan for an enlarged Court as uncertain.]

4. On April 28, another journal of liberal opinion, The New Republic, commented:[12]

[The writer cites the rumor that Justices Van Devanter and Sutherland plan to retire. He explains that the replacement of these two men with more liberal judges would transform the Court and thereby give Roosevelt's proposal, in light of the gossip, seems no longer a vital issue. The writer sees the rumor as in fact a "deadly attack" on Roosevelt's plan to reorganize the Supreme Court.]

5. In the introduction to his 1937 volume of Public Papers, President Roosevelt went on to discuss the series of events which transpired in

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[10]Paul W. Ward, "Roosevelt Will Win," The Nation (February 14, 1937), CXLIV, 202.

[11]"Supreme Court Takes Liberal Turn," Scholastic Magazine, April 17, 1937, 21.

[12]The New Republic, April 28, 1937, 356.

the months following his message on the Supreme Court:[13]

> [Roosevelt explains that his proposals included reforms in all Federal Courts and that many of his recommendations were adopted. Although his plan for the Supreme Court met strong opposition, some of whichhe outlines, he points out that finally the Court made decisions which supported his view of the role of the Federal government. Roosevelt suggests a variety of causes for the change: 1936 election returns, his own message, public pressure, etc. He discusses the minimum wage ruling in detail, and mentions the railway labor act.
>
> He claims that his objectives were finally realized by 1937 and further that the later, more liberal, set of rulings truly supported the spirit of the Constitution.]

6. Mr. Dooley, the humorous creation of Finley Peter Dunne, was a popular commentator on the American scene in newspapers at the turn of the century. He had said about the Supreme Court:[14]

> "An' there ye have th' decision, Hinnissy, that's shaken th' intellicts iv th' nation to their very foundations, or will if they try to read it. "'Tis all r-right. Look it over some time. "'Tis fine spoort if ye don't care f'r checkers. Some say it laves th' flag up in th' air an' some say that's where it laves th' constitution. Annyhow, something's in th' air. But there's wan thing I'm sure about."
>
> "What's that?" asked Mr. Hennessy.
>
> "That is," said Mr. Dooley, "no matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns."

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[13]Franklin D. Roosevelt, Public Papers, 1937, LXV-LXVII, LXIX-LXX. (Footnotes omitted.)

[14]Peter Finley Dunne, Mr. Dooley's Opinions (Robert Howard Russell, ed., R. H. Russell, New York, 1901), 26.

## SECTION IV

## JUDICIAL REVIEW

The evidence in this Section relates to the power which has made our courts the center of so much controversy.

### A. Courts Contrasted

The founding fathers looked to England for many of their ideas about government. The documents in this part give evidence as to the extent to which the British heritage dominated American thinking on the role of the court.

1. Judge Robert Yates attended the Constitutional Convention in 1787 but refused to approve the finished document. Opposing the ratification of the Constitution by the New York Ratifying Convention, he wrote a series of letters signed "Brutus" which appeared in the New York Journal and Weekly Register.[1]

> [The author objects to the immense power of the Supreme Court combined with "little responsibility." In English courts, he explains, judges serve while on "good behaviour," and their decisions are subject to review by the House of Lords. They are not empowered to declare an act of the legislature unconstitutional, but confine their decisions to accord with the existing laws of the land. In America the Court will rule the legislature, the author claims, in contrast to England where the legislature rules the courts.]

2. Alexis de Tocqueville, a French visitor to the United States in the early nineteenth century, published his keen observations in 1835.

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[1] "Brutus, No. XV" in the New York Journal and Weekly Register March 20, 1788 as quoted in Edward S. Corwin, Court Over Constitution (Peter Smith, Gloucester, 1957), 251, 253.

In his book, he had this to say about our judges:[2]

> [The Americans have retained . . . three distinguishing characteristics of the judicial power; an American judge can only pronounce a decision when litigation has arisen, he is only conversant with special cases, and he cannot act until the cause has been duly brought before the court. His position is therefore perfectly similar to that of the magistrate of other nations; and he is nevertheless invested with immense political power. If the sphere of his authority and his means of action are the same as those of other judges, it may be asked whence he derives a power which they do not possess. The cause of this difference lies in the simple fact that the Americans have acknowledged the right of the judges to found their decisions on the constitution, rather than on the laws. In other words, they have left them at liberty not to apply such laws as may appear to them to be unconstitutional. . . .
>
> This fact can only be explained by the principles of the American constitution. . . . In England, the parliament has an acknowledged right to modify the constitution; as, therefore, the constitution may undergo perpetual changes, it does not in reality exist; the parliament is at once a ligislative and constitutent assembly. The political theories of America are more simple and more rational. An American constitution is not . . . susceptible of modification by the ordinary powers of society as in England. . . . In America the constitution may, therefore, vary, but as long as it exists it is the origin of all authority. . . .
>
> Whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate, but it gives rise to immense political influence.

3. The Constitution of the United States:

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and

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[2]Alexis de Tocqueville, The Republic of the United States of America and Its Political Institutions Reviewed and Examined (Henry Reeves, trans., A. S. Barnes and Co., New York, 1851), I, 103, 105.

establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States, and Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens of Subjects.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulation as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

## B. The Origins

An examination of documents relating to the framing of the Constitution and to the debates that raged in the states over its ratification may show where the idea of judicial review was first articulated.

1. At Philadelphia Edmund Randolph presented the "Virginia Plan" which proposed a council of revision, made up of the President and some Supreme Court Justices, which would examine new legislation for its conformity to the Constitution before Congress had an opportunity to vote on measures.

James Madison's diary, our best source of information about the Convention, recounts one of the few discussions on the proposed council of revision:[3]

> The first clause of the eighth resolution, relating to a council of revision, was next taken into consideration.
>
> Mr. GERRY doubts whether the judiciary ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some states the judges had actually set aside laws, as being against the constitution. This was done, too, with general approbation. It was quite foreign from the nature of their office to make them judges of the policy of public measures. He moves to postpone the clause. . . .
>
> Mr. KING seconded the motion, observing that the judges ought to be able to expound the law, as it should come before them, free from the bias of having participated in its formation.

2. The Virginia Federal Convention Heard a speech by a young revolutionary war veteran and promising lawyer, John Marshall:[4]

> Is it not necessary that Federal courts should have cognizance of cases arising under the Constitution and laws of the United States? What is the purpose of a judiciary but to execute the laws in a peaceable, orderly manner, without shedding blood, or availing yourself of force? To what quarter will you look for protection from an infringement of the Constitution, if you will not give the power to the judiciary? . . .

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[3] Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787; with a Diary of the Debates of the Congress of the Confederation; as Reported by James Madison, A Member and Deputy from Virginia (Jonathan Elliot, ed., J. B. Lippincott & Co., Philadelphia, 1859), V, 151.

[4] Hugh Grigsby, The History of the Virginia Federal Convention of 1788 (Virginia Historical Society, Richmond, 1890), I, 298-299.

With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope, he said, that no gentleman will think that a State will be called at the bar of the Federal court. . . . It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States.

3. From Hamilton's Federalist, Number seventy-eight:[5]

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the Legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the right of the courts to pronounce Legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the Judiciary to the Legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American Constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No Legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid. . . .

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[5]E. H. Scott, ed., The Federalist, I, 426-427.

> It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the Legislature, in order, among other things, to keep the latter within the limits a assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the Judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the Legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

4. From the Federalist, Number eighty-one:[6]

> It may in the last place be observed, that the supposed danger of Judiciary encroachments on the Legislative authority, which has been upon many occasions reiterated, is, in reality, a phantom. Particular misconstructions and contraventions of the will of the Legislature may now and then happen: but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the Judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness; and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments in one part of the Legislative body, and of determining upon them in the other, would give to that body upon the members of the Judicial department. This is alone a complete security. There never can be danger that the Judges, by a series of deliberate usurpations on the authority of the Legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their station.

5. Democratic-Republican Thomas Jefferson won the presidential campaign of 1800. The outgoing Federalist President, John Adams, made certain

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[6] Ibid., 443.

that his party, though headed for political oblivion, would keep a toe-hold in government through the judiciary. He appointed his Secretary of State, John Marshall, Chief Justice of the Supreme Court, and at the very last moment appointed a large number of Federalists as judges in the lower federal courts, the lateness of the appointments earning them the nickname of the "midnight judges." Adams signed the commissions but his overburdened Secretary of State failed to see that all were delivered. Jefferson's new Secretary of State, James Madison, refused to deliver the commissions, whereupon one of the appointees William Marbury asked the Supreme Court for a writ of mandamus ordering Madison to deliver the commissions. The new Chief Justice found himself in a fix. If the Federalist Court ordered the Republican administration to hand over the commission, Jefferson, undoubtedly, would ignore it, thus emphasizing the weakness of the Court. If Marshall backed off, he would also be exposing the weakness of the Court. His Democratic-Republican opponents licked their chops and waited for the humiliation they were certain was to come. In his decision in the case of Marbury v. Madison, John Marshall not only outsmarted his political enemies but set a precedent vital for the future functioning of the Court.[7]

> The act to eftablifh the judicial courts of the United States authorizes the fupreme court "to iffue writs of "mandamus, in cafes warranted by the principles and ufages "of law, to any courts appointed, or perfons holding office, "under the authority of the United States."
>
> The fecretary of ftate, being a perfon holding an office under the authority of the United States, is precifely within the letter of the defcription; and if this court is not

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[7] 1 Cranch 137 (1803), 173, 176, 178, 180.

authorized to iffue a writ of mandamus to fuch an officer, it muft be becaufe the law is unconftitutional, and therefore abfolutely incapable of conferring the authority, and affigning the duties which its word purport to confer and affign. . . .

The authority, therefore, given to the fupreme court, by the act eftablifhing the judicial courts of the United States, to iffue writs of mandamus to public officers, appears not to be warranted by the conftitution; and it becomes neceffary to enquire whether a jurifdiction, fo conferred, can be exercifed.

The queftion, whether an act, repugnant to the conftitution, can become the law of the land, is a queftion deeply interefting to the United States; but, happily, not of an intricacy proportioned to its intereft. . . .

So if a law be in oppofition to the conftitution; if both the law and the conftitution apply to a particular cafe, fo that the court muft either decide that cafe conformably to the law, difregarding the conftitution; or conformably to the conftitution, difregarding the law, the court muft determine which of thefe conflicting rules governs the cafe. This is of the very effence of judicial duty.

If then the courts are to regard the conftitution; and the conftitution if fuperior to any ordinary act of the legiflature; the conftitution, and not fuch ordinary act, muft govern the cafe to which they both apply. . . .

The judicial power of the United States is extended to all cafes arifing under the conftitution. . . .

It is alfo not entirely unworthy of obfervation, that in declaring what fhall be the <u>fupreme</u> law of the land, the <u>conftitution</u> itfelf is firft mentioned; and not the laws of the United States generally, but thofe only which fhall be made in <u>purfuance</u> of the conftitution, have that rank.

Thus, the particular phrafeology of the conftitution of the United States confirms and ftrengthens the principle, fuppofed to be effential to all written conftitutions, that a law repugnant to the conftitution is void; and that <u>courts</u>, as well as other departments, are bound by that inftrument.

The rule muft be difcharged.

## SECTION V

## THE RULE OF LAW OR MEN?

Americans have a strong commitment to democracy. The majority rules. But what are the implications of judicial review for democracy? The documents in this section bear on this issue.

### A. The Issue

Part A presents two opinions on the power of the Supreme Court, one expressed in the early days of the republic and the other 161 years later.

1. John Jay was named by Washington as the first Chief Justice of the Supreme Court. He resigned his post after being elected governor of New York. As his term as governor expired, President Adams asked him to serve once again as Chief Justice. Jay replied:[1]

> Albany, 2d January, 1801
>
> Dear Sir:
>
> I have been honoured with your letter of the 19th ult. informing me that I had been nominated to fill the office of Chief Justice of the United States, and yesterday I received the commission. This nomination so strongly manifests your esteem, that it affords me particular satisfaction.
>
> Such was the temper of the times, that the Act to establish the Judicial Courts of the United States was in some respects more accommodated to certain prejudices and sensibilities, than to the great and obvious principles of sound policy. Expectations were nevertheless entertained that it would be amended as the public mind became more composed and better informed; but those expectations have not been realized, nor have we hitherto seen convincing indications of a disposition in Congress to realize them. On the contrary, the efforts repeatedly made to place the judicial department on a proper footing have proved fruitless.

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[1] Henry P. Johnson, ed., Correspondence and Papers of John Jay, 1794-1826 (G. P. Putnam and Sons, New York, 1893), IV, 284, 285.

> I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which are essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system; especially as it would give some countenance to the neglect and indifference with which the opinions and remonstrances of the judges on this important subject have been treated.

2. Senator Eastland of Mississippi is a present-day critic of the Supreme Court. He had this to say in a Senate speech delivered on May 16, 1962:[2]

> With sadness, I must agree with our distinguished majority leader that in the recent constitutional history of this Nation, the Supreme Court of the United States has infringed, invaded, and usurped the powers vested by the Constitution in the legislative branch of the Federal Government. . . .
>
> The members of the Senate and our colleagues in the House of Representatives are the last bastion for the defense of constitutional government. Far from yielding to the pressures and demands of the courts and the Executive, it is our duty to resist on every side the encroachments on our power and prerogatives, and to begin here and now to restore to the people of the United States the proper balance of power between the three coordinate branches of the Federal Government, and to protect the rights of the States and of the people thereof in preserving to them all powers that were not specifically delegated to the National Establishment.

## B. John Marshall's Court

John Adams planned to entrench the Federalists in the judiciary. He succeeded beyond his expectations, for party stalwart John Marshall

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[2] Congressional Record, 87th Cong., 2nd Sess., 7599.

remained Chief Justice of the Supreme Court for thirty-four years, well into Andrew Jackson's second term as President. Not only the length of his career, but the force of his character and his legal ability enabled him to play an important role in shaping the Court. President after President, determined to smother Marshall's influence, appointed associate justice after associate justice only to see their appointees fall under the spell of the mind and personality of this unusual man. He didn't win every battle, but he lost few.

1. The Georgia Legislature, bribed to the hilt, sold vast quantities of land near the Yazoo River to corrupt land speculators, who in turn sold it to "innocent" purchasers in the North. Georgia voters, outraged, elected a reform legislature which passed a law declaring that the sale by the corrupt legislature was null and void. The purchasers took the case to court. The issue was decided by the Supreme Court in Fletcher v. Peck:[3]

> It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. . . .
>
> In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant when issued, conveyed an estate . . . clothed with all the solemnities which law can bestow. This estate was transferrable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. . . .
>
> But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. . . .

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[3] 6 Cranch 89 (1810), 134-136, 139.

> The constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. . . .
>
> It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

2. Speaking in Congress, Representative Troup of Georgia commented on the Court's action in Fletcher v. Peck when claims were put forward as a result of the decision:[4]

> You are required to reward the claimants who bought of those who corrupted the Legislature of Georgia. We say, no! Let ruin overtake the corruptors of the Representatives of the people and all claiming under them. . . . Seeing you firm and inflexible, they turned about and addressed themselves to the Judiciary. They found in the law books of England a maxim which suited them; two of the speculators combined and made up a fictitious case, a feigned issue for the decision of the Supreme Court. They presented precisely those points for the decision of the Court which they wished the Court to decide, and the Court did actually decide them as the speculators themselves would have decided them if they had been in the place of the Supreme Court. . . . No matter, say the Judges, what the nature or extent of the corruption, be it ever so wicked, be it ever so nefarious, it could not be set aside. The speculators had hunted up a maxim of the common law or equity courts of England, and the Judges wielded it for their benefit and to the ruin of the country--the maxim that third purchasers without notice shall not be affected by the fraud of the original parties. Thus, sir, by a maxim of English law are the rights and liberties of the people of this country to be corruptly bartered by their Representatives. It is this decision of the Judges which has been made the basis of the bill on your table--a decision shocking to every free Government, sapping the foundations of all your constitutions, and annihilating at a breath the best hope of man. Yes, sir,

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[4]Annals of Congress, 12th Cong., 2nd Sess., 857-859.

it is proclaimed by the Judges, and is now to be sanctioned by the Legislature that the Representatives of the people may corruptly betray the people, may corruptly barter their rights and those of their posterity, and the people are wholly without any kind of remedy whatsoever. It is this monstrous and abhorrent doctrine which must startle every man in the nation, that you ought promptly to discountenance and condemn.

If, Mr. Speaker, the arch-fiend had in the bitterness of his hatred to mankind resolved the destruction of republican government on earth, he would have issued a decree like that of the judges; he would have said, in the spirit and language of this bill, let the claimants under the corruptors of the Representatives of the people be rewarded. In a nation of enlightened men, whose governments have their origin in and exist only by the will of the people, that will is contemned and held for nothing. Why, it may be asked, do the judges who passed this decision live and live unpunished? The answer is found in the mildness and moderation of our Government. I thank God it is so. If under a despotism the <u>throne</u> of the monarch had been thus assailed, the judges would have perished. Here the foundations of the Republic are shaken and the judges sleep in tranquillity at home. Take my word for it, Mr. Speaker--I beseech you to remember what I say--no party in this country, however deeply seated in power, can long survive the adoption of this measure. . . .

3. When in 1819 the State of Maryland placed a tax on the Baltimore branch of the Bank of the United States, a bank chartered by the federal congress, McCulloch, the treasurer of the bank, sued the state on the ground that the tax was unconstitutional. The case came eventually to the Supreme Court, where Chief Justice Marshall delivered the opinion in the famous decision of <u>McCulloch</u> v. <u>Maryland</u>.[5]

Mr. Chief Justice Marshall delivered the opinion of the Court.

In the case now to be determined, the defendent, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The constitution of our

[5] 4 Wheaton 316 (1819), 400-401, 421, 425, 432, 436.

country; in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. . . . On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank? . . .

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . . .

It being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire--

2. Whether the State of Maryland may, without violating the constitution, tax that branch? . . .

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States. . . .

The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

> We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

4. Niles' Weekly Register was a journal that kept a close watch on goings-on in government. It reprinted items of national interest from other publications as well as presenting its own material. The editor commented on the Supreme Court's decision in McCulloch v. Maryland:[6]

> A deadly blow has been struck at the sovereignty of the states, and from a quarter so far removed from the people as to be hardly accessible to public opinion--it is needless to say that we allude to the decision of the supreme court, in the case of McCulloch versus the state of Maryland, by which is established that the states cannot tax the bank of the United States.
>
> We are yet unacquainted with the grounds of this alarming decision, but of this are resolved--that nothing but the tongue of an angel can convince us of its compatibility with the constitution of the United States. . . .

5. The story of the Cherokee Indians is a sad tale. Instead of resisting the white man, they adopted his ways, settled down, established a government, and signed treaties with the United States. Unfortunately for the Cherokee, their "nation" occupied a large section of the richest lands claimed by Georgia, Tennessee, Alabama and North Carolina, and subsequently gold was discovered in the Indian lands. Georgia led the way in ignoring the treaties signed a generation earlier and claimed all lands within its boundaries along with the right to dispose of such lands, and to make laws for them.

In the case of Worcester v. Georgia, the Court had to decide a case in which the plaintiff, a New England missionary to the Cherokee,

[6] Niles' Weekly Register, March 13, 1819, 1.

was arrested for ignoring Georgia laws requiring state permission to reside in the disputed lands.

The Court's decision:[7]

> The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.
>
> The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity. . . .
>
> It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in the state of Georgia, condemning Samuel A. Worcester to hard labour, in the penitentiary of the state of Georgia, for four years, was pronounced by that court under colour of a law which is void, as being repugnant to the constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled.

6. Niles' Register of November 24, 1832 reprinted "extracts" from Governor Lumpkin's annual message to the Georgia Legislature:[8]

> Our conflicts with federal usurpation are not yet at an end; the events of the past year have afforded us new cause for distrust and dissatisfaction. Contrary to the enlightened opinions, and just expectations of the people of this, and every other state in the union, a majority of the judges of the supreme court of the United States, have not only assumed jurisdiction, in the case of Worcester and Butler, but have, by their decision, attempted to overthrow that essential jurisdiction of the state, in criminal cases, which has been vested by our constitution, in the superior courts of our own state. In conformity with their decision, a mandate was

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[7] 6 Peters 561 (1832), 561-563.

[8] Niles' Register, November 24, 1832, 206.

> issued, directed to our court, ordering a reversal of the decree under which those persons are imprisoned; thereby attempting, and intending to prostrate the sovereignty of this state in the exercise of its constitutional criminal jurisdiction. These extraordinary proceedings of the supreme court, have not been submitted to me officially, nor have they been brought before me in any manner which called for my official action. I have, however, been prepared to meet this usurpation of federal power, with the most prompt and determined resistance, in whatever form its enforcement might have been attempted, by any branch of the federal government. It has afforded me great satisfaction to find that our whole people, as with the voice of one man, have manifested a calm, but firm and determined resolution to sustain the authorities and sovereignty of their state, against this unjust and unconstitutional encroachment of the federal judiciary.

## C. Twentieth Century Critics

The issue raised by the development of the role of the Court under Marshall continues to the present. This part presents the viewpoint of some twentieth-century critics of the Court.

1. During the angry debate in the Senate over President Roosevelt's court reorganization bill, Senator Carl Hatch of New Mexico stated:[9]

> Mr. President, I am in agreement with much that has been said here today about the usurpation of legislative power by the judicial branch of the Government. I believe that the courts of the land throughout a long period of our history have constantly usurped legislative powers and have rendered policy-making decisions, which is something the courts have no right to do. I concede that to be true, and I concede that the Supreme Court has gone further than that. Not only has the Court, in my opinion, invaded the legislative power but in instances it has amended the Constitution of the United States. The Supreme Court of the Nation has usurped the powers reserved to the people of America. I believe that to be fact.

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[9] Congressional Record, 75th Cong., 2nd Sess., 6798.

2. In Nine Men Against America Rosalie M. Gordon commented on the role played by the Court:[10]

> [The passage deals with the 1954 decision of the Supreme Court which declared segregation in public schools unconstitutional. The author claims that racial problems cannot be settled by law and that this ruling aggravates racial tension. She describes the NAACP as "militant" and connects it with a "wave of left-wing activity." The true defendent, she claims, is each of the forty-eight states. The author contends that Chief Justice Warren and his colleagues ignored 165 years of Supreme Court decisions in this ruling and infringed upon what has traditionally been the right of individual states. The author sees the Court as attempting to write a law enforcing integration in public schools. She contends that separate facilities are not inherently unequal; she calls the psychological and sociological data cited in Warren's report "hearsay trivia." Miss Gorden quotes Mrs. Zora N. Hurston, a Negro, who states that she like the American Indian prefers separateness to enforced contact with people who do not wish to associate with her. Mrs. Hurston regards the 1954 decision as an insult to her race and evidence of a government attempt to rule by fiat rather than by the Constitution.]

3. In October, 1958, a popular magazine made the following comment:[11]

> [A review of the direction taken by the Court in recent years] shows, on the whole, a continuing and, we think, an accelerating trend toward increasing power of the National Government and correspondingly contracted power of the State governments. . . .
>
> Much of this stems from the doctrine of a strong, central Government and of the plenitude of national power within broad limits of what may be "necessary and proper" in the exercise of the granted powers of the National Government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. . . .
>
> We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises.

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[10]Rosalie M. Gordon, Nine Men Against America, 57-63.

[11]This selection is taken from a report issued from an annual meeting of State Court Chief Justices in 1958.

It is strange, indeed, to reflect that, under a Constitution which provides for a system of checks and balances and of distribution of power between national and State governments, one branch of one government--the Supreme Court--should attain the immense and, in many respects, dominant power which it now wields. . . .

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast.

## SECTION VI

## SOUTH AFRICA: ANOTHER SYSTEM

This section provides evidence that briefly illuminates the workings of the judiciary system in South Africa.

1. Speaking at an international conference on the "Rule of Law" held at Harvard University in 1956, Albert van de Sandt Centlivres, Chief Justice of the Union of South Africa, said:[1]

> [In contrast to the U. S. Supreme Court, the author explains, the South African Court decides only on whether new legislation accords with present law. There is no written constitution and therefore no problem of a higher authority than parliament. Parliament is omnipotent and can change all existing law to meet new situations. Its check is the electorate which can dissolve the body at the next general election.
>
> Individual rights are not fixed; while there is risk of infringement, there is also the possibility of flexibility which might better serve the cause of justice. A jury, for example, might not be necessary in some trials.
>
> In a trial in which the accused is non-white and the accusor white, racial tensions might interfere with impartial justice. Or technical knowledge might be required to understand the case and a jury might not possess the necessary qualifications. Given the South African situation, the author feels that a system has been devised which does in fact administer impartial justice.]

2. In June, 1963, an article entitled "The Africans for Liberty, Rule of Law in Eclipse," appeared in Round Table, a magazine devoted primarily to matters concerning the British Commonwealth:[2]

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[1] Albert van de Sandt Centlivres, "The Constitution of the Union of South Africa and The Rule of Law," Government Under Law (Arthur E. Sutherland, ed., Harvard University Press, Cambridge, 1956), 427-430, 435-436, 444-447.

[2] "The Afrikaans for Liberty, Rule of Law in Eclipse," Round Table, LIII (June, 1963), 257-262.

THE AFRIKAANS FOR LIBERTY

Rule of Law in Eclipse

[The writer describes the decline of personal liberty and the restrictions on Court activity in South Africa. He cites the institution of "house arrest," a practice designed ostensible for the purposes of national security; the Minister of Justice claims that "house arrest" is in accord with the rulings of Parliament and therefore legal. The author enumerates restrictions of movement, ownership, employment, jury trial, etc. He documents the erosion of the freedom from illegal search with a list of changing regulations. The writer discusses South Africa's anti-Communist activity and claims that many regulations in this area are in fact methods by which the government can rended inactive many critics of its policies. Court jurisdiction is often removed, he explains, on grounds of expediency when the charges involve Communism.]

3. The July 8, 1966 issue of the New Statesman, a noted British weekly, printed an article by Caroline de Crespigny, "Prisoner of Dr. Verwoerd:"[3]

[The author describes her imprisonment during which time she was detained as a state witness. She was held under the "180 day" clause which operates in cases concerning Communist activity. Mrs. de Crespigny was in solitary confinement for 144 days, interrogated for long periods, verbally abused, threatened with a truncheon, and generally maltreated. The author claims that the "180 day" rule was devised in reality to allow the security police to "obtain information through brutal and illegal techniques," to force detainees to cooperate with threats of further imprisonment, and to "lay charges against detainees who are never brought to Court as witnesses at all." The author cites other cases in which "state witnesses" received treatment similar to hers.]

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[3]Caroline de Crespigny, "Prisoner of Dr. Verwoerd,""New Statesman, July 8, 1966, 42, 44.

## SECTION VII

## JUDICIAL RESTRAINT

During World War II and since, the example of naked, unrestricted power wielded by totalitarian, police-state governments has constantly been before us. During this same period significant changes taking place in the United States have raised serious questions as to the rights of individuals in their relationship to the government. Two such changes are the Negro drive for equality and the growth in power and centralization of our own government.

In the 1950's and 1960's the Supreme Court decided numerous cases dealing with the civil rights of individuals. Among the more important of these cases have been: (1) Brown v. Topeka (1954) which has been discussed; (2) Watkins v. United States (1957) in which the Court drew tighter limits on the power of Congressional investigating committees to force witnesses to testify; (3) Baker v. Carr (1962) which stated the Court's right to examine the manner in which state legislatures divided voting districts in order that voters could be fairly represented by legislators; (4) Gideon v. Wainwright (1963) in which the Supreme Court proclaimed the right of a defendant in a criminal trial to have a lawyer, irrespective of his ability to pay; and (5) Escobedo v. Illinois (1963) in which the Court refused to allow the use of a defendant's confession because he hadn't been properly advised as to his rights, including that of having a lawyer while being questioned.

Unquestionably the Court in these and many similar decisions, has been showing great concern for the rights of the individual. To many, the Court would seem to be enlarging definitions of what these rights constitute.

1. In its December, 1966 issue the Reader's Digest magazine presented one reaction to this policy:[1]

> [The article begins with a description of Federal Judge George L. Hart who, while shaking his finger angrily at an accused murderer about to be acquitted, berated the U. S. Court of Appeals for disallowing certain confessions and generally obstructing justice. The writer claims that during the past nine years the Supreme Court has "progressively handcuffed the police" and cites some of these rulings and some examples of the consequences of these decisions. The author maintains that police must be allowed to do an effective job of law enforcement. He mentions the work of the American Law Institute and its Model Code for police practice as a forward step. He claims that the Supreme Court, or at least five of its Justices, demand super-human behavior on the part of police in the matter of procedure. The writer praises the British model for courts and warns that recent Supreme Court rulings in the area of law enforcement have been dangerously extreme.]

2. In reviewing a book by Justice William O. Douglas, Edmond Cahn restated the basic issue:[2]

> [The writer explains that two philosophies have been in conflict in the Supreme Court for fifteen years and that in his book the liberal Justice Douglas presents his view of the battle, emphasizing the importance of the First Amendment in the Bill of Rights. The reviewer explains the positions of Hamilton and Jefferson on this issue and outlines Douglas's Jeffersonian view. Justice Douglas argues against relying on the Judges' sense of the "reasonable," and sees the Bill of Rights as a necessary restraint against encroachments on personal liberty. The author quotes Douglas's criticism of the view of Judge Learned Hand that the First Amendment contains "no more than admonitions of moderation." Douglas considers this attitude responsible for "eroding the democratic ideal."]

3. The following article was written by Justice Hugo Black:[3]

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[1]Eugene H. Methvin, "Let's Have Justice for Non-Criminals, Too!", The Reader's Digest, December, 1966, 53-55, 59-60.

[2]Edmond Cahn, "A Basic Issue Restated,""New York Times Book Review Section, January 19, 1958, 3.

[3]Hugo L. Black, "The Bill of Rights and the Federal Government," The Great Rights (Edmond Cahn, ed., The Macmillan Co., New York, 1963), 44-45, 55.

[Justice Black outlines various views on the application of the Bill of Rights to limit the law-making function of Congress. He discusses the view of the prohibitions as admonitions which might be changed or ignored to prevent "a substantive evil," or public injury, etc. Justice Black takes the position that the prohibitions in the Bill of Rights are absolutes, and were intended as such. Certain areas such as religion, speech, etc., must be under any circumstances beyond the jurisdiction of Congress.]

4. Justice Felix Frankfurther has been the most eloquent spokesman for a different point of view.[4]

It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. . . .

Not so long ago we were admonished that "the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government." . . .

When Mr. Justice Holmes, speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," Missouri, K. & T. Ry. Co.,v. May, he went to the very essence of our constitutional system and the democratic conception of our society. . . .

Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables.

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[4]West Virginia Board of Education v. Barnette, 319 U. S. 625 (1943), 647, 649, 652. (Dissenting opinion; citation omitted.)

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## SUGGESTIONS FOR FURTHER READING

The card catalogue of any library is filled with names of books bearing on the subjects covered in this unit, unfortunately, many of them are extremely technical. The following list is limited to a few books that are not too dry and that would serve to interest as well as to inform you.

If you wish to know more about the life of John Marshall, one book has been considered the standard against which all biographies of the Chief Justice are measured. This is The Life of John Marshall by Albert J. Beveridge (Houghton Mifflin Co., Boston, 1919). It not only covers Marshall's life and his service in the Court, but it paints an excellent picture of that period in American history. Mr. Justice edited by Allison Dunham & Philip B. Kurland (University of Chicago Press, Chicago, 1964)* contains a brief biography of Marshall.

An outstanding book about important Supreme Court cases, one that makes each case a dramatic and exciting story is John A. Garraty's Quarrels That Have Shaped the Constitution (Harper & Row, 1964)*.

Gideon's Trumpet by Anthony Lewis (Random House, New York, 1964)*, which focuses on Gideon v. Wainright mentioned in Section VII, gives a vivid picture of the Supreme Court in action.

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*Available in paperback edition.